Supreme Court, U.S.
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No. 07-744

In The

Supreme Court of the United States

DEAN M. GAST,

Petitioner,

v.

JEAN JENNER,

Respondent.

On Petition For Writ of Certiorari
To The Florida Fifth District Court of Appeal

PETITION FOR WRIT OF CERTIORARI

Dean M. Gast
PO Box 48312
St. Petersburg, Florida 33743
(386) 255-5244
Pro Se

QUESTIONS PRESENTED

1. Whether First Amendment protection of speech as "rhetorical hyperbole" extends to defamatory statements published with malicious intent to cause harm, which are susceptible of being proven true or false within the context of Milkovich v. Lorain Journal, 497 U.S. 1 (1990), where such statements were known to be false as published or were published with reckless disregard of truth or falsity within the context of New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

2. Whether the granting of summary judgment below conflicts with this court's holding in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) and Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991) and so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

3. Whether the grant of summary judgment in the trial court on grounds of rhetorical hyperbole where hyperbole was not pled in answer or raised as grounds by motion violated petitioner's right to due process under the Fourteenth Amendment.

PARTIES TO PROCEEDINGS BELOW

Petitioner and Respondent are citizens of the State of Florida. There were no corporate entities as parties to the proceedings below.

In addition to the parties named in the caption, the cause of one Randy L. Brewer was consolidated at the trial court level and for purposes of appeal in the Florida Fifth District Court of Appeal.

Mr. Brewer has elected not to join in this petition.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS AND ORDERS BELOW

The orders and opinions of the lower courts are unreported and have been reproduced in the appendix at the locations noted:

Florida Seventh Judicial Circuit order granting final summary judgment in favor of defendant dated July 26, 2006 [Pet. App. 1a];

Florida Fifth District Court of Appeal decision affirming (PCA) dated May 29, 2007 [Pet. App. 6a];

Florida Fifth District Court of Appeal order denying rehearing, written opinion and rehearing *en banc* dated July 19, 2007 [Pet. App. 7a];

Florida Supreme Court order dismissing review dated August 21, 2007 [Pet. App. 8a];

Florida Supreme Court order *sua sponte* striking motion for rehearing dated September 27, 2007 [Pet. App. 9a];

JURISDICTION

The Florida Fifth District Court of Appeal affirmed (PCA) the summary judgment decision of the lower court on May 29, 2007 [Pet. App. 6a] and denied petitioner's motion for rehearing, written opinion and rehearing *en banc* on July 19, 2007. [Pet. App. 7a]

The Florida Supreme Court dismissed petitioner's Petition for Review citing lack of jurisdiction

on August 21, 2007 [Pet. App. 8a] and *sua sponte* struck petitioner's motion for rehearing on September 27, 2007. [Pet. App. 9a] This petition was filed within ninety (90) days of the Florida Supreme Court's dismissal order. This Court has jurisdiction under 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution, made applicable to the states by the Fourteenth Amendment, provides in relevant part: "Congress shall make no law * * * abridging the freedom of speech, or of the press." U.S. Const. Amend. (Amd. 1).

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend. (Amd. 14).

Relevant provisions of Florida law are §286.011 Fla. Stat. (2002) and §768.72 Fla. Stat. (2005). These statutes have been reproduced in the appendix. [Pet. App. 14a] Applicable provisions of the Florida Rules of Civil Procedure, §1.140, §1.430 and §1.510 have been reproduced at [Pet. App. 21a].

STATEMENT OF THE CASE

Factual Background

In January 2002, Jean Jenner authored and published, to third parties (including Ormond Beach, Florida city commissioners, members of the general public and the Daytona Beach News Journal ("News Journal")), a series of false statements alleging Gast had orchestrated a "conspiracy" to fire a local city manager and alleging Gast had attempted to "rig" the Ormond Beach city manager selection process in 2001. [R 411 – 412] Verbatim text of the statements sued upon has been reproduced at [Pet. App. 12a].

Gast was a sitting member of the Ormond Beach Development Review Board at the time Jenner published his statements. [R 163] Pursuant to §286.011(3)(b) Fla. Stat. (2002), [Pet. App. 14a] Jenner's statements impute to Gast the commission of unlawful acts.

In a rush to judgment, and without apparent due diligence concerning the falsity of Jenner's statements, News Journal sought to effect in a court room that which it had not achieved at the ballot box. Within days of receiving Jenner's communications, News Journal filed a lawsuit[1] naming three (3) Ormond Beach city commissioners as defendants and naming Gast as a "conduit" in the commissioners' allegedly illegal actions.

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[1] *See* Case No. 2002-30268 CICI, Volusia County, Florida, Seventh Judicial Circuit, styled News Journal Corporation Etc. v. Jim Privett, Et Al ("News Journal v. Privett").

Final Judgment in News Journal v. Privett held against the News Journal and in favor of the defendant commissioners. [R 882-931] Final Judgment held the allegations of the News Journal v. Privett complaint concerning Gast's averred actions as a "conduit" were without merit.

> "Final Judgment" In The Matter Of News-Journal v. Privett (pg. 36)[2]
>
> "In summary, for all of the foregoing reasons, the News Journal has failed to prove its allegations that Boyle and Privett and High illegally conspired, directly or indirectly through conduits [Gast and Brewer], to fire Turner." [Clarification; *e.s.*] [R 919]

Jenner was afforded opportunity to retract his false statements concerning Gast; he refused. On January 15, 2004, Gast sued Jean Jenner alleging libel and defamation. Entitlement to jury trial was pled pursuant to Fla. R. Civ. P., 1.430(b). [R 410 – 415]

These are the facts and they are undisputed.

Proceedings In The Trial Court

Petitioner brought suit in the trial court asserting libel and defamation and alleging Jenner's published statements were false, were published with malicious intent to cause harm and were known

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[2] See "Final Judgment" Case No. 2002-30268 CICI, Volusia County Florida, Seventh Judicial Circuit, styled as News Journal Corporation Etc. v. Jim Privett, Et Al ("News Journal v. Privett"). [R 884]

to be false as published or were published with reckless disregard of truth or falsity.

Under oath, Mr. Jenner admitted the statements sued upon were "fact and opinion":

> Interrogatory Answers; August 27, 2004.
>
> "Identify any and all research done prior to the publication of the statements alleged as defamatory and libelous within the complaint, with respect to any facts asserted by the Defendant within said statements, together with the name of each individual performing such research and the substance of knowledge acquired through said research.
>
> **Answer:** None. Statements contained in my email contained **true opinions, facts, and personal knowledge**." [e.s.] [R 156]

Prior to summary judgment hearing, the court (under a predecessor judge) granted plaintiff's motion for leave to amend to assert claim for punitive damages[3] stating in relevant part:

> "Under Florida law, '[a] civil action for libel will lie when there has been a false and unprivileged publication by letter, or otherwise, which exposes a person to distrust, hatred, contempt, ridicule or obloquy or which causes such person to be avoided, or which has a tendency to injure

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[3] *See* Fla. Stat. s.768.72(1) (2004) [Pet. App. 19a]; Thomas v. Jacksonville Television, Inc., 699 So.2d 800 (Fla. 1st DCA 1997).

> such person in his office, occupation, business or employment.'"); LRX, Inc. v. Horizon Associates Joint Venture, 842 So.2d 881 (Fla. 4th DCA 2003) (although pure opinion is shielded from liability for defamation, mixed statements of opinion and fact are not)." [Pet. App. 10a]

Hyperbole was not raised in the pleadings and hyperbole was not raised as grounds for summary judgment. Not withstanding this fact, in its final summary judgment in favor of defendant Jenner [Pet. App. 1a], the trial court held plaintiff Gast to be a "private figure" and further held the statements sued upon were not defamatory or were protected as "rhetorical hyperbole".

Constitutional questions relative to the First and Fourteenth Amendment issues posed in the "Questions Presented" were raised before the trial court at summary judgment hearing. Citation from the record establishing preservation as to each of these grounds is cited in verbatim text below:

A. The First Amendment offers no protection from liability where there is communication of a false statement of fact:

> [Mr. Gast]: "The communication of a false statement of fact is not protected from liability for defamation under either the First Amendment or under Article 1, Section 4 of the Florida Constitution. While an action for defamation may not be based on a statement of pure opinion, a statement couched as opinion is defamatory if it expresses or implies factual assertions

> which may be proved to be false, as in this case, Your Honor.
>
> And, again, the authority on that is Florida Medical v. New York Post Company, citing Milkovich v. Lorain Journal.[4]
>
> A statement couched as opinion will not receive constitutional protection where it expresses false factual assertions. Even if the speaker states the facts upon which he bases his opinion, which Mr. Jenner has admitted under oath he has not done * * * If those facts are either incorrect or incomplete or if his assessment of those facts is erroneous, the statement may still imply a false assertion of fact and be liable to a defamation claim. Simply couching a statement in terms of opinion does not dispel these implications." [R 36;10]

B. Jenner published his statements with malicious intent to cause harm and admitted his plan was to make Gast's "life miserable."

> Jenner Deposition (June 7, 2005) p33;11. [R 442 – 445]
>
> Q Okay. I'd like to go to the next email. Exhibit D. Would you read for me the fourth paragraph of that email, sir? It's a one-sentence paragraph.

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[4] Florida Medical v. New York Post Company, 568 So.2d 454 (Fla. 4th DCA 1990) citing Milkovich v. Lorain Journal, 497 U.S. 1 (1990).

A "Well, I'm planning on making the bad acquaintances life miserable."

Q Okay. First of all, who did you mean by bad acquaintances?

A People that were advising commissioner to fire Isaac Turner.

Q Did you mean Mr. Gast?

A Yes.

[Mr. Gast]: "Mr. Jenner's statement of January 24th -- that's Complaint Exhibit D -- boldly announced his plan, and I quote "to make the lives of Plaintiffs Gast and Brewer miserable." He wasn't setting out to educate anyone. He was setting out to make the lives of two people miserable."

"That same day Mr. Jenner published his open threat to execute that plan... That's Exhibit C in the Complaint, Jenner's threat. **Fasten your seat belt, 'cause I'm coming.'"** [e.s] [R 41;13]

C. Evidence of Record established a prima facie showing of provable falsity:

[Mr. Gast]: "There's the affidavit of Jeffery Boyle September 12th, 2005. He states that Jenner's statements indicating that either Dean Gast or Randy Brewer orchestrated the firing of Isaac Turner are completely false.

He further states that Jenner's statements indicating that Dean Gast or Randy Brewer attempted to rig the city man-

ager's selection process in Ormond Beach during that time period -- or during the time period that Isaac Turner was hired are completely false." [R27;16]

D. Jenner knew his statements were false as published, or published his statements with reckless disregard as to their ultimate truth or falsity. [R 38;6]

[Mr. Gast]: "Mr. Jenner knew that his statements were false concerning Gast and Brewer at the time that he published them. And Mr. Jenner has admitted that he was personally informed by Mr. Privett as to Privett's actual reasons for seeking to fire Turner. It had nothing to do with Gast or Brewer..."

But just to indicate this a little more forcefully, I'd like to cite deposition transcript from April 9th, 2003. That's Docket Number 170 at Page 18, Line 11."

Jenner Deposition (April 9, 2003) p18;11

Q Okay. And so -- just so I'm clear, you understood he [*referring to Commissioner Privett; Clarification Added*] was upset about the hiring -- or temporary hiring, whichever it was.

A The reorganization issue which was one issue. That was the -- that was the thing that really upset him was the fact that Isaac Turner was trying to do an organization just before

the city commission -- before this city commission take place.

Q Okay.

A And then there was a civil issue which was also the Sagorski hiring as a permanent planner -- chief planner. [*sic... Sikorski... Correction Added*].

Q Okay. And my question to you is: You understood he -- he had those concerns based on conversations you actually had with Jim Privett?

A Yes.

Q Okay. Face-to-face conversations?

A He came to my shop and told me he wanted to fire Turner and this is why he wanted to fire Turner.

Jenner Deposition (June 7, 2005) p17;10

Q So you were not a witness to any conversations between Mr. Gast and Jim Privett?

A No.

Q Using those same terms, sir, were you a witness to any conversations between Dean Gast and Joyce High?

A No.

Q And that was concerning Isaac Turner, I should have added to the question. Next question, were you a

witness to any conversations between Dean Gast and Jeff Boyle concerning the firing of Isaac Turner?

A No.

Q And did you have any conversations with Dean Gast, prior to Isaac Turner being fired, about the question of whether Mr. Turner should be fired?

A No.

At hearing, the trial court made specific comment regarding Jenner's reckless disregard: [R 86;21]

"THE COURT: Well, reckless disregard – I mean, if Mr. Jenner has said he had no information to the contrary, and yet he alleges that these gentlemen are orchestrating, how -- how can that not be with reckless disregard?

MR. HANDEL: Well, I think, Judge --

THE COURT: This is an issue for a fact-finder."

E. Hyperbole was not raised as a defense in the pleadings and no motion was before the court raising hyperbole as grounds for summary judgment "with particularity" as is required by Fla. R. Civ. P., 1.510(c). [R 23;2]

[Mr. Gast]: "One, Mr. Jenner openly represented his statements as quote/unquote "the facts." That's not hyperbole.

> Secondly, and perhaps more importantly from a legal standpoint, the Defendant has not pled the defense of hyperbole. As such, a hyperbole defense is waived.
>
> And third, statements of hyperbole may not contain factual assertions which are provably false. Mr. Jenner's statements are provably false by evidence in the record and, as such, cannot be protected as hyperbole. Authority on that is Zambrano v. Devanesan, Fourth District DCA, 1986.[5]

Proceedings In The Appellate Court

On appeal, petitioner's brief raised numerous issues:

A. Whether Findings Of Fact Are Supported By Evidence: Genuine Issues Of Fact Exist As To Express Malice And Actual Malice; [IB 7 – 11]

B. Whether Jenner's Statements Asserted False Statements Of Fact; [IB 12 – 13]

C. Whether Jenner's Statements Implied A Knowledge Of Undisclosed Fact; And Whether Readers Were Previously Aware Of Undisclosed Fact. [IB 14 – 19]

D. Whether The Finding That Jenner's Statements Are "Hyperbole" Is Supported By Constitutional Authority Or Record Evidence And Whether Jenner's Statements Are Facially Defamatory And Libelous Per Se. [IB 20 – 36]

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[5] Zambrano v. Devanesan, 484 So.2d 603 (Fla. 4th DCA 1986).

E. Whether The Granting Of Summary Judgment Expressly And Directly Conflicts With Authority As To Applicable Standards For The Granting Of Summary Judgment. [IB 37 – 45]

F. Whether The Granting Of Summary Judgment Violated Appellant's Right To Due Process Under U.S. Const. Amend. (Amd. 14) And Under Fla. R. Civ. P., 1.510(c). [IB 46 – 49]

On May 29, 2007, the Florida Fifth District Court of Appeal affirmed the final judgment entered in the district court in a PCA decision without citation or opinion. [Pet. App. 6a]

Petitioner timely moved for rehearing, written opinion and rehearing *en banc* citing numerous instances of decisional conflict with prior decisions of the Fifth District Court of Appeal:

1) The panel's *per curiam* decision is contrary to prior decision(s) of this court and a consideration by the full court is necessary to maintain uniformity of decisions in this court. *See* State v. Georgoudiou, 560 So.2d 1241, 1246 (Fla. 5th DCA 1990)[6] (rehearing *en banc* is appropriate where "the unexplained ruling of the *per curiam* majority conflicts with established law of this court.").

2) In the court below, Judge Walsh granted leave to amend allowing claim for punitive damages and ruled the statements sued upon were mixed opinion, defamatory and libelous per se. On motion

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[6] *See also* State v. Eicher, 431 So.2d 1009, 1011 n.1 (Fla. 3d DCA 1983) ("where *per curiam* affirmance of the trial court's order conflicts with court's prior opinion... rehearing *en banc* [is] necessary to maintain uniformity in decisions.").

for summary judgment, Judge Rouse (a successor) ruled the statements were hyperbole and not defamatory.

3) Entitlement to jury trial was pled and the instant *per curiam* decision conflicts with established law of this court in Scott v. Busch, 907 So.2d 662, 667 (Fla. 5th DCA 2005).[7]

> "Where the alleged defamation can be understood one of two ways only one of which is defamatory to the plaintiff, it is normally a decision for the fact-finder to determine what a reasonable person hearing the statement would likely have understood it to mean". Scott v. Busch at 667.

4) Jenner asserted in sworn Answer to interrogatories that his statements were "true and accurate". Where material issues of fact exist, the *per curiam* decision conflicts with established summary judgment law of this court in Petruska v. Smartparks-Silver Springs, Inc., 914 So.2d 502, 504 (Fla. 5th DCA 2005).[8]

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[7] The *per curiam* decision also conflicts with established law of this court in Ford v. Rowland, 562 So.2d 731, 734 (Fla. 5th DCA 1990) ("if an allegedly defamatory publication is reasonably susceptible of two meanings, one of which is defamatory and one of which is not, it is for the trier of fact to determine the meaning understood by the average reader."). Non 5th DCA *citations omitted.*

[8] On identical issues of law, the *per curiam* decision also conflicts with this court's summary judgment law established in Aagaard-Juergensen, Inc. v. Lettelier, 540 So.2d 224, 225 (Fla. 5th DCA 1989); Juno Industries, Inc. v. Heery Int'l, 646 So.2d 818, 821 (Fla. 5th DCA 1994); Scheibe v. Bank Of America,

> "If the evidence raises any issue of material fact, if it is conflicting, if it will permit different reasonable inferences, or if it tends to prove the issues, it should be submitted to the jury as a question of fact to be determined by it." Petruska v. Smartparks at 504.

5) Hyperbole was not raised as ground(s) in appellee's pleadings or summary judgment motion and was argued only at summary judgment hearing. The *per curiam* decision conflicts with established law of this court in Deluxe Motel, Inc. v. Patel, 727 So.2d 299, 301 (Fla. 5th DCA 1999) (judicial error "to rely on the arguments made at the hearing but not in the motion.").

6) The *per curiam* decision also conflicts with established law of this court in Alvarez v. Singh, 888 So.2d 159, 160 (Fla. 5th. DCA 2004) *citing* Cortina v. Cortina, 98 So.2d 334 (Fla. 1957) ("A trial court is without jurisdiction to hear and determine matters not subject to appropriate pleadings and notice.").[9]

On July 19, 2007, the Florida Fifth District Court of Appeal entered its order denying rehearing, written opinion and rehearing *en banc*. [Pet. App. 7a]

N.A., 822 So.2d 575, 575 (Fla. 5th DCA 2002), and Watson v. Hahn, 664 So.2d 1083, 1084 (Fla. 5th DCA 1995).

[9] *See also* Newberry v. Newberry, 831 So.2d 749, 751 (Fla. 5th DCA 2002) ("A trial court lacks jurisdiction to enter any judgment on an issue not raised by the pleadings.").

The Florida Supreme Court dismissed petitioner's Petition for Review citing lack of jurisdiction on August 21, 2007. [Pet. App. 8a] This timely petition for certiorari ensued.

REASONS FOR GRANTING THE WRIT

Jenner's statements were published to an "uninformed" reader as "the facts" with no qualifying factual background information; the statements are provably false. The statements imply Gast committed unlawful acts and the statements were admittedly published with malicious intent for the stated purpose of making Gast's "life miserable."

Central to the questions presented is whether such statements, which were known by Jenner to be false as published or which were published with reckless disregard of their truth or falsity (actual malice under this Court's standard established in New York Times Co. v. Sullivan, 376 U.S. 254 (1964)), consist of actionable libel or whether those statements may be couched as hyperbole and receive First Amendment protection.

The Petition for Writ of Certiorari should be granted for four reasons:

A. First, the trial court's grant of summary judgment on the basis of rhetorical hyperbole flatly conflicts with this Court's precedent excluding First Amendment protection for the "known lie" as defined within the context of Garrison v. Louisiana, 379 U.S. 64 (1964); Milkovich v. Lorain Journal, 497 U.S. 1 (1990); and New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

The premise of this Court's holding in Garrison and progeny is directly at odds with the trial court decision in this case.

> "That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality..." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection. [379 U.S. 64, 76]

Freedom of expression and uninhibited debate are guaranteed by the First Amendment. However, the First Amendment's guarantee does not protect a person from liability for communicating a false statement of fact. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

"Whether a statement is fact or opinion is not the dispositive factor in determining whether First Amendment protection exists; [the] determination rests upon whether the statement contains express

or implied factual assertions that may be proved to be false."[10] Florida Medical Center v. New York Post Co., 568 So.2d 454 (Fla. 4th DCA 1990) citing Milkovich v. Lorain Journal, 497 U.S. 1 (1990).

B. Second, the precedent defined in the Bresler-Letter Carriers-Falwell line of cases[11] and clarified in Milkovich provides protection for statements that cannot "reasonably [be] interpreted as stating actual facts" about an individual. In Milkovich, this Court noted that this protection provides assurance that public debate will not suffer for lack of "imaginative expression" or "rhetorical hyperbole".

However, in the instant case, the record evidence provides a prima facie showing that Jenner's false statements "already have" been construed as stating actual facts concerning the petitioner. This issue was preserved at the trial court level.

> THE COURT: So the use of the word "people conspired together," you -- you are saying that the ordinary person would accept

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[10] **"We note that the issue of falsity relates to the defamatory facts implied by a statement**. For instance, the statement," I think Jones lied," may be provable as false on two levels. First, that the speaker really did not think Jones had lied but said it anyway, and second that Jones really had not lied. It is, of course, the second level of falsity which would ordinarily serve as the basis for a defamation action, though falsity at the first level may serve to establish malice where that is required for recovery." Milkovich. [*e.s.*]

[11] Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6 (1970); Letter Carriers v. Austin, 418 U.S. 264, 284 -286 (1974); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988).

that as some kind of criminal conspiracy allegation?

MR. GAST: I'm saying that many people have. The News-Journal filed a lawsuit and named myself and Mr. Brewer as a conduit as a result of that very email communication. They went to court claiming a wrongful act, so not only many people, but certainly many people in Daytona Beach at the News-Journal thought it was a criminal act, because they named myself and Mr. Brewer as a conduit resulting from that very communication.

THE COURT: All right.

Jenner's statements impute to Gast the commission of an unlawful act. Overlooked or misapprehended by the order below is the fact that at the time of Jenner's statements, Gast was a member of the Ormond Beach Development Review Board. [R 163] As Gast was a sitting "board member" of a "municipal corporation, or political subdivision," Gast was subject to §286.011(3)(b) Fla. Stat. (2002) which states in relevant part:

"(b) Any person who is a member of a board or commission or of any state agency or authority of any county, municipal corporation, or political subdivision who knowingly violates the provisions of this section by attending a meeting not held in accordance with the provisions hereof is guilty of a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083." [*e.s.*].

Relevant to punishment for violations of §286.011(3)(b) Fla. Stat. (2002), §775.08 Fla. Stat. (2002) paragraph (4) states:

> "(4) The term "crime" shall mean a felony or misdemeanor." [*e.s.*]

A false statement which **infers**[12] that Gast committed an unlawful act is both defamatory and actionable per se.[13]

> "When the words published concerning a person tend to degrade him, bring him into ill repute, destroy confidence in his integrity, or cause other like injury, such language is actionable per se." Spears v. Albertson's, Inc., 848 So.2d 1176 (Fla. 2d DCA 2003), *citing* Axelrod v. Califano, 357 So.2d 1048, 1050 (Fla. 1st DCA 1978).

Where there is reasonably a question as to the "sense" in which words were meant or intended, whether a statement is defamatory and the sense in which it is understood by the "common mind" is a question for the fact-finder and not a question for the

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[12] While an action for defamation may not be based on a statement of pure opinion, a statement couched as an opinion may be defamatory if it expresses or implies factual assertions that can be proved to be false. Milkovich v. Lorain Journal, 497 U.S. 1 (1990).

[13] Scott v. Busch, 907 So.2d 662, 667 (Fla. 5th DCA 2005) ("A statement that a person has committed a crime or done something illegal is one of the classic slander per se categories – that is, the pleader need not allege specific damages to state a cause of action.").

court. Scott v. Busch, 907 So.2d 662, 667 (Fla. 5th DCA 2005).[14]

Hyperbole is a viable defense only where abstract or figurative language negates the implication of provably false defamatory fact. Milkovich at 21. No mitigating language exists in Jenner's statements. Neither the explicit language of Jenner's statements nor Jenner's sworn affirmations of fact and opinion negate the implication of provably false defamatory fact.

In Milkovich, this Court chose not to differentiate between "fact and opinion" but between "fact and non-fact".[15] Milkovich holds no wholesale exemption for statements merely "labeled" as hyperbole. Liability accrues in any statement "sufficiently factual to be susceptible of being proved true or false." Milkovich at 19. In this case, there is evidence that the News Journal Corporation "already have" interpreted Jenner's statements as stating actual defamatory facts about Gast. [Gast RB 4-5]

C. Third, where there is record evidence of intent to cause harm, falsity of the statements published, and where the record evidence supports a showing that such statements were known to be false as published or were published with reckless disre-

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[14] "In a situation... where the alleged defamation can be understood one of two ways only one of which is defamatory to the plaintiff, it is normally a decision for the fact-finder to determine what a reasonable person hearing the statement would likely have understood it to mean, based on the circumstances and audience involved." Restatement of Torts (2d) §614(2) (1977).

[15] Milkovich v. Lorain Journal, 497 U.S. 1 (1990).

gard of truth or falsity within the context of New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the granting of summary judgment below conflicts with this court's holding in Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) and Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991).

Summary judgment is authorized only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) ("summary judgment will not lie if the dispute about a material fact is "genuine," that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.")

Where there is a prima facie showing that the statements were published with knowledge of falsity or with reckless disregard of their truth or falsity, as in this case, "the evidence creates a jury question". Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991).

The moving party bears the burden of proving that no genuine issue of material fact exists. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). In determining whether the moving party has satisfied the burden, a court considers all inferences drawn from the underlying facts in the light most favorable to the party opposing the motion and resolves all reasonable doubts against the moving party. Anderson, 477 U.S. at 255. The court may not weigh conflicting evidence or weigh the credibility of the parties. *See*

Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913, 919 (11th Cir. 1993) (citation omitted). If a reasonable fact finder could draw more than one inference from the facts, and that inference creates an issue of material fact, then a court must not grant summary judgment. *Id.* (citation omitted).

"[T]he nonmoving party may avail itself of all facts and justifiable inferences in the record taken as a whole." Tipton v. Bergrohr GMBH-Siegen, 965 F.2d 994, 998 (11th Cir. 1992) (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)). All justifiable inferences are to be drawn in favor of the nonmovant, and the evidence presented by the nonmovant is to be believed by the court. Tipton, 965 F.2d at 999 (quoting Anderson, 477 U.S. at 255 (citing Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-159 (1970)).

In this case, there is direct evidence of falsity [Pet. at 8] and there is direct evidence that Jenner's statements were known to be false as published or were published with reckless disregard of truth or falsity. [Pet. at 9]

D. Finally, the trial court's grant of summary judgment on the basis of "rhetorical hyperbole" expressly conflicts with this Court's precedent established in Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

> "a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, to-

gether with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact."

The summary judgment procedure is necessarily in derogation of the constitutionally protected right to trial. Holl v. Talcott, 191 So.2d 40, 48 (Fla. 1966). Any "statute which is in derogation of the common law is subject to strict interpretation." Southern Attractions v. Grau, 93 So.2d 120 (Fla. 1956).

Procedural due process requires: "(1) a hearing (2) before an impartial decision-maker, after (3) fair notice of the charges and allegations, (4) with an opportunity to present one's own case." Blaylock v. Zeller, 932 So.2d 479, 480-81 (Fla. 5th DCA 2006). In this case, a hearing was held, but the remaining elements of procedural due process were absent.

Jenner's Amended Motion For Summary Judgment was neither sworn nor supported by affidavit and the motion cited no ("summary judgment evidence") as is required by Fla. R. Civ. P., 1.510(c). Schrank v. Pearlman, 683 So.2d 559 (Fla. 3d DCA 1996) ("Objection lies to motion for summary judgment which is not supported by sworn affidavit or other competent evidence").

In this case, hyperbole was not pled as an affirmative defense and pursuant to Fla. R. Civ. P., 1.140(b) the hyperbole defense may not be raised by motion. Jenner's Amended Motion For Summary Judgment failed to specifically and with particularity raise the issue of "hyperbole" as grounds for summary judgment. Cortina v. Cortina, 98 So.2d 334 (Fla. 1957) (A trial court lacks jurisdiction to enter

any judgment on an issue not raised by the pleadings.)

Fla. R. Civ. P., 1.510(c) states in relevant part:

> (c) Motion and Proceedings Thereon. The motion shall state with particularity the grounds upon which it is based and the substantial matters of law to be argued and shall specifically identify any affidavits, answers to interrogatories, admissions, depositions, and other materials as would be admissible in evidence ("summary judgment evidence") on which the movant relies."

For this reason, Jenner's argument of "hyperbole" (presented only as verbal argument at hearing) was not properly before the court to be considered as grounds for granting summary judgment. H.B. Adams Distributors, Inc. v. Admiral Air of Sarasota County, Inc., 805 So.2d 852 (Fla. 2d DCA 2001) ("Surprise is not favored. Motion was deficient which did not contain adequate notice of issue to be argued.")

The granting of summary judgment below on the underlying grounds of "hyperbole" where the defense was not pled and no motion raised "hyperbole" as potential grounds for summary judgment, is a clear violation of petitioner's constitutional right to procedural due process under the Constitution's Fourteenth Amendment (U.S. Const. Amend. (Amd. 14)) and Fla. R. Civ. P., 1.510(c).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Dean M. Gast
PO Box 48312
St. Petersburg, Florida 33743
(386) 255-5244
Pro Se

APPENDIX "A"

Final Summary Judgment For Defendant

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

DEAN M. GAST

Plaintiff,

v.

JEAN JENNER, Individually

Defendant.

_____/

Case No. 2004-30073 CICI
Division: 02

FINAL SUMMARY JUDGMENT IN FAVOR OF DEFENDANT

THIS MATTER came to be heard on July 20, 2006, on motion of Defendant, Jean Jenner, for summary judgment, and the court heard the argument of counsel for Defendant and the argument of Plaintiff, and has reviewed the pertinent portions of the record of this defamation action. The court finds, concludes and adjudges as follows:

Undisputed facts:

1. Plaintiff and Defendant have for some years engaged in political activity, including matters involving the City of Ormond Beach. On January 15, 2002, the city commis-

sioners of the City of Ormond Beach terminated the employment of the city manager, one Isaac Turner. Plaintiff was very much in favor of this termination, while Defendant vehemently disapproved.

2. Before 2002, Plaintiff had served on a committee which had reviewed and "ranked" the applications of those who had applied for the city manager position, and Mr. Turner had not been included on the short list of those recommended by the committee. Notwithstanding that omission, he was hired by the city commission and served as city manager until he was terminated in January, 2002 (Mr. Turner was rehired/reinstated as City Manager at a later date).

3. The termination vote of the city commission received much publicity, and was extremely controversial. Before the vote, Plaintiff had communicated his views in favor of termination to one or more city commissioners. After the city commission vote to terminate Mr. Turner's employment (and before he was again employed), Defendant authored and published six email communications during the period January 18 - February 1, 2002, which referred to the termination. These emails were composed and communicated to others, including an editor of the local newspaper, because of, and solely in connection with, this political dispute.

The instant action:

4. Plaintiff, who is self-represented,[16] alleges in his Third Amended Complaint that the six email communications constitute libel, and claims general damages.

Conclusions:

5. Plaintiff Gast was, at all times pertinent, a "private figure." Although he has served as a member of an advisory board of the City of Ormond Beach (the Development Review Board), the six email communications did not address *any acts* or omissions as a board member.

6. The emails assert that Plaintiff Gast, together with one Randy L. Brewer (a plaintiff in a consolidated case), "orchestrated" the city commission's firing of the city manager. The emails further assert that in some unspecified manner, Plaintiff Gast and Brewer were "directing" three city commissioners "on what to say" regarding the firing. The emails also stated that when Plaintiff Gast and Brewer served on the committee reviewing the applications, they tried to engineer or "rig" that process to ensure that a candidate they favored would be hired. Finally, the emails asserted that Gast and Brewer were bad influences on the city commissioners, and that, in the opinion of the author, each was a "nutcase."

7. The statements contained in the six

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[16] Although self-represented, Plaintiff Gast is no stranger to litigation; he has been a plaintiff or defendant in some ten different actions filed in Volusia County from 2002 to the present.

emails are not defamatory. The emails are accusatory and vitriolic in tone, and hyperbolic. However, with the exception of the "nutcase" comment, they allege merely that Plaintiff engaged in permitted political activity. It is often observed that "Politics ain't beanbag." Allegations that one has engaged in permitted political activity—even if the allegations are strident and hostile—do not constitute defamation, when communicated in the context of a political controversy. See, e.g., *Seropian v. Forman,* 652 So2d 490 (Fla.4th DCA 1990), holding that an accusation of "influence peddling" was not, as a matter of law, defamation.

8. Plaintiff contends that one or more of the emails falsely assert, at least by implication, that Plaintiff had illegally conspired to violate Florida's "Sunshine Law," §286.011, F.S. The emails, however, simply do not assert that the commissioners violated that law, and certainly do not assert or imply that Plaintiff did so. Moreover, section 286.011 prohibits public officials from meeting together in private, and without notice to the public and an opportunity for the public to be privy to their discussions. This law does not apply to private citizens, and does not prohibit private citizens from expressing their views to public officials, or meeting privately with them, or suggesting to them—"directing"—what they should say regarding a political controversy. The emails do not accuse Plaintiff of any infamous illegal activity.

9. Even assuming the statements of fact contained in the emails to be false, the court finds, as a matter of law, that the statements did not and do not expose Plaintiff to distrust, ridicule,

hatred, or contempt, nor would they have a tendency to injure him in his occupation, business, or employment. Thus, the statements contained in the emails are not, as a matter of law, libelous.

10. The statement that Plaintiff is a "nutcase" is obviously hyperbole, an expression of pure opinion, and, in context, could not be understood to be a serious accusation of mental illness. The court finds, as a matter of law, that this statement cannot constitute actionable defamation.

Whereupon,

IT IS ADJUDGED that final summary judgment is entered in favor of Defendant, that Plaintiff, DEAN M. GAST, 500 North Street, Daytona Beach, Florida 32114, take nothing by this action, and that Defendant, JEAN JENNER, 11 Pine Valley Circle, Ormond Beach, Florida 32174, shall go hence without day and recover costs from said Plaintiff, DEAN M. GAST.

DONE AND ORDERED in Chambers at DeLand, Volusia County, Florida, this 26th day of July, 2006.

s/ ROBERT K. ROUSE, JR.
CIRCUIT JUDGE

Copies to:
Dean Gast
Diego Handel, Esquire

APPENDIX "B"

Fifth District Order - Per Curiam Affirmed

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 2007

DEAN M. GAST, Case No. 5D06-2714
5D06-2996

Appellant,

v.

JEAN JENNER,

Appellee.

_____/

Decision filed May 29, 2007

Appeal from the Circuit Court
for Volusia County,
Robert K. Rouse, Jr., Judge

Dean M. Gast, Daytona Beach, pro se.
Randy L. Brewer, Ormond Beach, pro se.
Diego Handel of Glasser and Handel,
Daytona Beach, for Appellee.

PER CURIAM.

AFFIRMED.

ORFINGER, MONACO AND EVANDER, JJ.,
concur.

APPENDIX "C"

Fifth District Order Denying Rehearing, Written Opinion and Motion For Rehearing En Banc

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 2007

DEAN M. GAST, Case No. 5D06-2714
5D06-2996

Appellant,

v.

JEAN JENNER,

Appellee.
_____/

DATE: July 19, 2007

BY ORDER OF THE COURT:

ORDERED that Appellant's Motion for Rehearing and Written Opinion and Motion for Rehearing En Banc, filed June 11, 2007, is denied.

I hereby certify that the foregoing is
the original Court order.
s/ SUSAN WRIGHT, CLERK

cc: Dean M. Gast
Diego Handel, Esq.
Randy L. Brewer

APPENDIX "D"

Florida Supreme Court Order Dismissing

SUPREME COURT OF FLORIDA

TUESDAY, AUGUST 21, 2007

CASE NO.: SC07-1565
Lower Tribunal No(s): 5D06-2714
5D06-2996

DEAN M. GAST vs. JEAN JENNER, ET AL.

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. See Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

No motion for rehearing will be entertained by the Court.

A True Copy
Test:
s/ Thomas D. Hall
Clerk, Supreme Court
jj
Served:
HON. SUSAN WRIGHT, CLERK
DEAN M. GAST
DIEGO HANDEL
RANDY L. BREWER
HON. DIANE M. MATOUSEK, CLERK
HON. ROBERT K. ROUSE, JR.

APPENDIX "E"

Florida Supreme Court Order Striking Rehearing

SUPREME COURT OF FLORIDA

THURSDAY, SEPTEMBER 27, 2007

CASE NO.: SC07-1565
Lower Tribunal No(s): 5D06-2714
5D06-2996

DEAN M. GAST vs. JEAN JENNER, ET AL.

Petitioner's letter dated August 30, 2007, has been treated as a motion for rehearing and is hereby stricken as unauthorized pursuant to this Court's order dated August 21, 2007.

A True Copy
Test:
s/ Thomas D. Hall
Clerk, Supreme Court

bm
Served:
HON. SUSAN WRIGHT, CLERK
DEAN M. GAST
DIEGO HANDEL
RANDY L. BREWER
HON. DIANE M. MATOUSEK, CLERK
HON. ROBERT K. ROUSE, JR.

APPENDIX "F"

Order Granting Gast Motion To Amend Complaint to Add Claim For Punitive Damages

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IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

DEAN M. GAST — Case No. 2004-30073 CICI
Division: 02

Plaintiff,

v.

JEAN JENNER, Individually

Defendant.
_____/

RANDY L. BREWER — Case No. 2004-30099 CICI
Division: 02

Plaintiff,

v.

JEAN JENNER, Individually

Defendant.
_____/

ORDER GRANTING GAST MOTION TO AMEND COMPLAINT TO ADD CLAIM FOR PUNITIVE DAMAGES

THIS CAUSE came on before the court to consider Plaintiff GAST's Motion to Amend Complaint to Add Claims for Punitive Damages filed September

14, 2005, and the court having heard the arguments of the parties at hearing on November 1, 2005, and having considered the plaintiff's proffer and the memoranda submitted herein, it is thereupon,

ORDERED that said motion is hereby GRANTED. The court finds that plaintiff GAST has demonstrated a reasonable showing by evidence in the record that, if true, would entitle him to seek punitive damages against the defendant. See, Fla. Stat. s.768.72(1) (2004); Thomas v. Jacksonville Television, Inc., 699 So.2d 800 (Fla. 1st DCA 1997) ("Under Florida law, '[a] civil action for libel will lie when there has been a false and unprivileged publication by letter, or otherwise, which exposes a person to distrust, hatred, contempt, ridicule or obloquy or which causes such person to be avoided, or which has a tendency to injure such person in his office, occupation, business or employment.'"); LRX, Inc. v. Horizon Associates Joint Venture, 842 So.2d 881 (Fla. 4th DCA 2003)(although pure opinion is shielded from liability for defamation, mixed statements of opinion and fact are not). Plaintiff shall file his amended complaint within ten days hereof and defendant shall be permitted ten days from the date of service to serve his answer.

DONE AND ORDERED in chambers at Daytona Beach Florida this 16th day of November 2005.

s/ J. David Walsh
Circuit Court Judge

Copies to: Dean M. Gast, pro se
Randy L. Brewer, pro se
Diego Handel, Esquire

APPENDIX "G"

Statements Sued Upon

Statements January 18th, 2002.
"I'm sick of Ormond Beach being run by nutcase like Gast, Brewer and Carter this will stop I frankly I can take care of them by myself!"

Statements January 24th, 2002:
"The facts: This firing conspiracy was orchestrated by Randy Brewer and Dean Gast and a few other like Jim Power and Glenn Jasper. I may have missed one or two."

Statements January 24th, 2002:
"Hello there;
You must be very proud of yourself! I wanted to congratulate you personally. You managed to destroy the political careers and credibility of three commissioners and humiliated our city in your attempt to destroy Isaac Turner.

Bravo!

But don't think you are getting away with it! You are on city boards and therefore are public officials (read the city charter.) You are subject to the same public scrutiny and criticism as Isaac Turner... like they say "fasten your seatbelt cuz I'm coming.""

Statements January 24th, 2002:
"Could it be because of the bad influence from certain individuals? As a former schoolteacher I'm sure you

noticed how some good kid can turn bad because of bad acquaintances."

"Well, I'm planning on making the bad acquaintances life miserable!"

Statements January 25th, 2002:

"Mr. Dean Gast and Mr. Randy Brewer orchestrated the firing of Mr. Turner. The reason that the "trio" sounds alike is that the same two people are directing them on what to say. You have no idea how hard Harriet Damesek and I worked to stop them from firing Turner. Talk to Harriet Damesek (I understand she maybe to disgusted to speak to anyone now) or stop by my bakery (La Gourmandise) sometime, I'll be more than happy to explain to you how two individuals Dean and Gast managed to do so much damage a get away with it."

Statements February 1st, 2002:

"Gast and Brewer also tried to rig that process because they wanted Don O'Donnilley, the planning director at the time to get the job. "

"They (Gast and Brewer) were not happy that the commission, selected someone else and from the day Turner came to Ormond Beach, they intended to get rid of him... and as you may have guessed bring back Don O'Donnilley."

APPENDIX "H"

§286.011 Florida Statutes

286.011 Public meetings and records; public inspection; criminal and civil penalties.

(1) All meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision, except as otherwise provided in the Constitution, at which official acts are to be taken are declared to be public meetings open to the public at all times, and no resolution, rule, or formal action shall be considered binding except as taken or made at such meeting. The board or commission must provide reasonable notice of all such meetings.

(2) The minutes of a meeting of any such board or commission of any such state agency or authority shall be promptly recorded, and such records shall be open to public inspection. The circuit courts of this state shall have jurisdiction to issue injunctions to enforce the purposes of this section upon application by any citizen of this state.

(3)(a) Any public officer who violates any provision of this section is guilty of a noncriminal infraction, punishable by fine not exceeding $500.

(b) Any person who is a member of a board or commission or of any state agency or authority of any county, municipal corporation, or political subdivision who knowingly violates the provisions of this section by attending a meeting not held in accordance with the provisions hereof is guilty of a mis-

demeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(c) Conduct which occurs outside the state which would constitute a knowing violation of this section is a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

(4) Whenever an action has been filed against any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision to enforce the provisions of this section or to invalidate the actions of any such board, commission, agency, or authority, which action was taken in violation of this section, and the court determines that the defendant or defendants to such action acted in violation of this section, the court shall assess a reasonable attorney's fee against such agency, and may assess a reasonable attorney's fee against the individual filing such an action if the court finds it was filed in bad faith or was frivolous. Any fees so assessed may be assessed against the individual member or members of such board or commission; provided, that in any case where the board or commission seeks the advice of its attorney and such advice is followed, no such fees shall be assessed against the individual member or members of the board or commission. However, this subsection shall not apply to a state attorney or his or her duly authorized assistants or any officer charged with enforcing the provisions of this section.

(5) Whenever any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision appeals any court order which has found

said board, commission, agency, or authority to have violated this section, and such order is affirmed, the court shall assess a reasonable attorney's fee for the appeal against such board, commission, agency, or authority. Any fees so assessed may be assessed against the individual member or members of such board or commission; provided, that in any case where the board or commission seeks the advice of its attorney and such advice is followed, no such fees shall be assessed against the individual member or members of the board or commission.

(6) All persons subject to subsection (1) are prohibited from holding meetings at any facility or location which discriminates on the basis of sex, age, race, creed, color, origin, or economic status or which operates in such a manner as to unreasonably restrict public access to such a facility.

(7) Whenever any member of any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision is charged with a violation of this section and is subsequently acquitted, the board or commission is authorized to reimburse said member for any portion of his or her reasonable attorney's fees.

(8) Notwithstanding the provisions of subsection (1), any board or commission of any state agency or authority or any agency or authority of any county, municipal corporation, or political subdivision, and the chief administrative or executive officer of the governmental entity, may meet in private with the entity's attorney to discuss pending litigation to which the entity is presently a party before a court or

administrative agency, provided that the following conditions are met:

(a) The entity's attorney shall advise the entity at a public meeting that he or she desires advice concerning the litigation.

(b) The subject matter of the meeting shall be confined to settlement negotiations or strategy sessions related to litigation expenditures.

(c) The entire session shall be recorded by a certified court reporter. The reporter shall record the times of commencement and termination of the session, all discussion and proceedings, the names of all persons present at any time, and the names of all persons speaking. No portion of the session shall be off the record. The court reporter's notes shall be fully transcribed and filed with the entity's clerk within a reasonable time after the meeting.

(d) The entity shall give reasonable public notice of the time and date of the attorney-client session and the names of persons who will be attending the session. The session shall commence at an open meeting at which the persons chairing the meeting shall announce the commencement and estimated length of the attorney-client session and the names of the persons attending. At the conclusion of the attorney-client session, the meeting shall be reopened, and the person chairing the meeting shall announce the termination of the session.

(e) The transcript shall be made part of the public record upon conclusion of the litigation.

History.--s. 1, ch. 67-356; s. 159, ch. 71-136; s. 1, ch. 78-365; s. 6, ch. 85-301; s. 33, ch. 91-224; s. 1, ch. 93-232; s. 210, ch. 95-148; s. 1, ch. 95-353.

Relevant to punishment for violations of §286.011(3)(b) Fla. Stat. (2002), §775.08 Fla. Stat. (2002) paragraph (4) states:

> "(4) The term "crime" shall mean a felony or misdemeanor." [*e.s.*]

APPENDIX "I"

§768.72 Florida Statutes

768.72 Pleading in civil actions; claim for punitive damages.--

(1) In any civil action, no claim for punitive damages shall be permitted unless there is a reasonable showing by evidence in the record or proffered by the claimant which would provide a reasonable basis for recovery of such damages. The claimant may move to amend her or his complaint to assert a claim for punitive damages as allowed by the rules of civil procedure. The rules of civil procedure shall be liberally construed so as to allow the claimant discovery of evidence which appears reasonably calculated to lead to admissible evidence on the issue of punitive damages. No discovery of financial worth shall proceed until after the pleading concerning punitive damages is permitted.

(2) A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence. As used in this section, the term:

(a) "Intentional misconduct" means that the defendant had actual knowledge of the wrongfulness of the conduct and the high probability that injury or damage to the claimant would result and, despite that knowledge, intentionally pursued that course of conduct, resulting in injury or damage.

(b) "Gross negligence" means that the defendant's conduct was so reckless or wanting in care that it constituted a conscious disregard or indifference to the life, safety, or rights of persons exposed to such conduct.

(3) In the case of an employer, principal, corporation, or other legal entity, punitive damages may be imposed for the conduct of an employee or agent only if the conduct of the employee or agent meets the criteria specified in subsection (2) and:

(a) The employer, principal, corporation, or other legal entity actively and knowingly participated in such conduct;

(b) The officers, directors, or managers of the employer, principal, corporation, or other legal entity knowingly condoned, ratified, or consented to such conduct; or

(c) The employer, principal, corporation, or other legal entity engaged in conduct that constituted gross negligence and that contributed to the loss, damages, or injury suffered by the claimant.

(4) The provisions of this section shall be applied to all causes of action arising after the effective date of this act.

History.--s. 51, ch. 86-160; s. 1172, ch. 97-102; s. 22, ch. 99-225.

APPENDIX "J"

Florida Rules of Civil Procedure (2006)

RULE 1.140. DEFENSES

(a) When Presented.

(1) A defendant shall serve an answer within 20 days after service of original process and the initial pleading on the defendant, or not later than the date fixed in a notice by publication. A party served with a pleading stating a crossclaim against that party shall serve an answer to it within 20 days after service on that party. The plaintiff shall serve an answer to a counterclaim within 20 days after service of the counterclaim. If a reply is required, the reply shall be served within 20 days after service of the answer.

(2) The service of a motion under this rule, except a motion for judgment on the pleadings or a motion to strike under subdivision (f), alters these periods of time so that if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleadings shall be served within 10 days after notice of the court's action or, if the court grants a motion for a more definite statement, the responsive pleadings shall be served within 10 days after service of the more definite statement unless a different time is fixed by the court in either case.

(3) If the court permits or requires an amended or responsive pleading or a more definite statement, the pleading or statement shall be served within 10 days after notice of the court's action. Re-

sponses to the pleadings or statements shall be served within 10 days of service of the pleadings or statements.

(b) How Presented. Every defense in law or fact to a claim for relief in a pleading shall be asserted in the responsive pleading, if one is required, but the following defenses may be made by motion at the option of the pleader: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a cause of action, and (7) failure to join indispensable parties. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. The grounds on which any of the enumerated defenses are based and the substantial matters of law intended to be argued shall be stated specifically and with particularity in the responsive pleading or motion. Any ground not stated shall be deemed to be waived except any ground showing that the court lacks jurisdiction of the subject matter may be made at any time. No defense or objection is waived by being joined with other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert any defense in law or fact to that claim for relief at the trial, except that the objection of failure to state a legal defense in an answer or reply shall be asserted by motion to strike the defense within 20 days after service of the answer or reply.

RULE 1.430. DEMAND FOR JURY TRIAL; WAIVER

(a) Right Preserved. The right of trial by jury as declared by the Constitution or by statute shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other party a demand therefor in writing at any time after commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. The demand may be indorsed upon a pleading of the party.

RULE 1.510. SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, crossclaim, or third-party claim or to obtain a declaratory judgment may move for a summary judgment in that party's favor upon all or any part thereof with or without supporting affidavits at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party.

(b) For Defending Party. A party against whom a claim, counterclaim, crossclaim, or third-party claim is asserted or a declaratory judgment is sought may move for a summary judgment in that party's favor as to all or any part thereof at any time with or without supporting affidavits.

(c) Motion and Proceedings Thereon. The motion shall state with particularity the grounds upon

which it is based and the substantial matters of law to be argued and shall specifically identify any affidavits, answers to interrogatories, admissions, depositions, and other materials as would be admissible in evidence ("summary judgment evidence") on which the movant relies. The movant shall serve the motion at least 20 days before the time fixed for the hearing, and shall also serve at that time copies of any summary judgment evidence on which the movant relies that has not already been filed with the court. The adverse party shall identify, by notice mailed to the movant's attorney at least 5 days prior to the day of the hearing, or delivered no later than 5:00 p.m. 2 business days prior to the day of the hearing, any summary judgment evidence on which the adverse party relies. To the extent such summary judgment evidence has not already been filed with the court, the adverse party shall serve copies on the movant by mailing them at least 5 days prior to the day of the hearing, or by delivering them to the movant's attorney no later than 5:00 p.m. 2 business days prior to the day of hearing. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions, affidavits, and other materials as would be admissible in evidence on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.